IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHANNON SHAUP and JAMES SHAUP, her husband,	:	CIVIL ACTION
	:	NO. 97-7260
Plaintiffs,	:	
v.	:	
SHANE FREDERICKSON and READING BLUE MOUNTAIN and NORTHERN RAILROAD COMPANY,	:	
Defendants.	:	

M E M O R A N D U M

BUCKWALTER, J. November 16, 1998

Presently before the Court is the Motion for Permission to File an Immediate Appeal of Defendants Shane Frederickson and Reading Blue Mountain and Northern Railroad Company. Defendants' motion is DENIED because this Court finds that its earlier order granting in part and denying in part Defendants' Motion for Summary Judgment does not involve substantial grounds for a difference of opinion sufficient to warrant an appeal, and that an appeal would not materially advance the ultimate termination of the litigation.

I. BACKGROUND

Plaintiff Shannon Shaup brought this negligence action to recover for injuries she incurred during a railroad grade crossing accident involving her automobile and a locomotive operated by Defendant Shane Frederickson, an employee of Defendant Reading Blue Mountain

and Northern Railroad Company. Plaintiff James Shaup, husband of Shannon Shaup, was not present at the scene of the accident but claimed a loss of consortium from his wife's injuries.

Defendants moved this Court for summary judgment on three alternative grounds. First, and most broadly, they argued that Mrs. Shaup's conduct in driving her vehicle amounted to contributory negligence, which would wholly bar any recovery. Second, addressing only some of the theories of negligence alleged by Plaintiffs, they contended that Pennsylvania state law governing railroad grade crossings preempted Plaintiffs' claims, in essence arguing that state law abrogated a railroad's independent common law duty to provide adequate warning devices at crossings. And finally, again addressing only some of the theories of negligence alleged by Plaintiffs, they maintained that federal law regulating railroad safety preempted Plaintiffs' claims.

This Court granted in part and denied in part Defendants' Motion for Summary Judgment. See Shaup v. Frederickson, No. CIV. A. 97-7260, 1998 WL 726650 (E.D. Pa. Oct. 16, 1998). Defendants have now returned, seeking the following amendments to the Court's earlier order so that they may seek an interlocutory appeal:

> (1) Whether the doctrine of state preemption precludes plaintiffs' claims that Reading Blue Mountain and Northern Railroad Company (RBMN) failed to provide adequate warning signals, including flashing lights, at the crossing where plaintiff's accident occurred, given the Court's finding that 66 Pa. C.S.A. § 2720(b) "vests the PUC with exclusive power to determine the manner in which crossings will be maintained, operated, and protected in the interests of public safety."

> (2) Whether the doctrine of federal preemption precludes plaintiffs' claim that RBMN failed to provide adequate warning signals, including flashing lights, at the crossing, given the fact [that] federal funds participated in and were expended towards the installation of such warning devices prior to the plaintiff's accident.

Defs. Proposed Order at 1-2.

II. DISCUSSION

The statutory provision permitting a district court to certify an order for interlocutory appeal, 28 U.S.C. § 1292(b), provides for certification where

> such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

The United States Court of Appeals for the Third Circuit has instructed that before an order can be certified for interlocutory appeal, all three factors identified in the statute must be satisfied. See Katz v. Carte Blanche Corp., 496 F.2d 747, 754 (3d Cir.), cert. denied, 419 U.S. 885 (1974). "The decision to certify an order for appeal under § 1292(b) lies within the sound discretion of the trial court and a district court should exercise its discretion mindful of the strong policy against piecemeal appeals." In re Orthopedic Bone Screw Prods. Liab. Litig., No. MDL 1014, 1998 WL 254038, at *8 (E.D. Pa. May 5, 1998) (Bechtle, J.) (internal quotations and citation omitted); see also Link v. Mercedes-Benz of N. Am., Inc., 550 F.2d 860, 863 (3d Cir.) ("we cannot sanction an erosion of the prohibition against 'piecemeal' appellate review"), cert. denied, 431 U.S. 933 (1977).

Inasmuch as the Court's holdings in the October 16th Order involved interpretations that effectively negated Defendants' affirmative defenses based on state and

federal law preemption, such order may be fairly characterized as "involving controlling questions of law." See Katz, 496 F.2d at 755 (suggesting that "'controlling' means serious to the conduct of the litigation, either practically or legally"). Where Defendants fail to satisfy their burden under § 1292(b) is in demonstrating that there are substantial grounds for a difference of opinion and that an appeal would materially advance the ultimate termination of the litigation.

A. Substantial Grounds for a Difference of Opinion

Defendants' state law preemption arguments involved the construction of a Pennsylvania statute, 66 Pa Cons. Stat. Ann. § 2702 (West 1979). While Defendants presented caselaw interpreting comparable statutes in other states, no authority (caselaw or legislative history) was presented construing the Pennsylvania statute at issue. Indeed, the Court's independent research failed to yield any applicable authority under Pennsylvania or Third Circuit jurisprudence. Consequently, the Court expressly noted that this was a "question of first impression under Pennsylvania law." Shaup, at 9, 1998 WL 726650, at *6.

Defendants' federal law preemption arguments involved interpretations of a seminal United States Supreme Court case, CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993). Both parties identified disagreement amongst the federal courts over the interpretations. However, no court in the Third Circuit (let alone the Eastern District of Pennsylvania), had previously opined on these issues, leading this Court to note that "the scope of federal preemption in this area is an issue of first impression." Shaup, at 14, 1998 WL 726650, at *8.

Accordingly, the Court finds that there are no substantial grounds for a difference of opinion on either the state or federal law preemption issues. If questions of first impression alone were sufficient to warrant certification for an immediate appeal, our Court of Appeals

would be besieged with piecemeal interlocutory appeals. Federal district courts are obliged to apply the law faithfully and to observe both constitutional and prudential limitations on their adjudicatory powers. When, in the course of discharging those duties, a heretofore undecided issue of law should arise, district courts are authorized to make a determination with the understanding that appellate review will be available to the litigants affected by that ruling. As Defendants readily acknowledge, "[t]he issues of federal and state preemption will ultimately be decided in an appeal to the Third Circuit Court of Appeals following a trial in this action." Defs. Mot. ¶ 10.

B. Materially Advancing the Ultimate Termination of the Litigation

The Court is also of the opinion that an appeal at this stage would not materially advance the ultimate termination of the litigation. If this Court's rulings on the state and federal preemption law issues were erroneous, a trial would not be prevented as those affirmative defenses would only eliminate some, but not all, of Plaintiffs' theories of negligence. See Shaup, at 2, 9, 14, 1998 WL 726650, at *1, 5, 8. Moreover, the facts of this case are relatively straightforward and thus, there would be no appreciable reduction in the length of the trial should the additional theories addressed by the state and federal law preemption defenses be included. The Court also notes that discovery in this case has been completed and the action has already been placed in the trial pool.

III. CONCLUSION

For the foregoing reasons, Defendants' motion seeking certification of an interlocutory appeal is DENIED. An appropriate order follows.

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O R D E R

AND NOW, this ____ day of November 1998, upon consideration of the Motion for Permission to File an Immediate Appeal of Defendants Shane Frederickson and Reading Blue Mountain and Northern Railroad Company (Docket No. 14) and Plaintiff's response thereto (Docket No. 15), it is hereby ORDERED that Defendants' motion is DENIED, in accordance with the accompanying memorandum.

BY THE COURT:

_____
RONALD L. BUCKWALTER, J.